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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMAN VINCENT BROOME,

Defendant and Appellant.

E046415

(Super.Ct.No. RIF130598)

OPINION

APPEAL from the Superior Court of Riverside County. Kenneth Ziebarth, Judge.
(Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part with directions.

Rex Williams, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Gary W. Schons, Assistant Attorney General, Michael Murphy and James D.
Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Norman Vincent Broome appeals from a jury conviction for taking or driving a vehicle without the owner's consent after having been convicted of the same offense. (Pen. Code, § 666.5, subd. (a); Veh. Code, § 10851.) On due process grounds, he challenges an instruction given to the jury and the sufficiency of the evidence to support the verdict. He also contends there is insufficient evidence to sustain the trial court's true finding on one of his prior convictions.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, a police officer testified he went to a residence with other officers to conduct a warrant search. As he approached on foot, he observed defendant and several other people standing outside the residence. The officer detained a female, Renee Shaffer (Shaffer), who was standing outside. Defendant ran through the house and was detained by other officers when he exited through the back door.

A red or burgundy vehicle (the vehicle) with no license plates was parked outside the residence. Shaffer told the officer she came to the residence with defendant in the vehicle and defendant was driving. Shaffer testified defendant told her the vehicle was stolen, but she also recalled he had a key. She did not remember what the key looked like or where he put it.

An 11-year-old girl who was at the residence when the police arrived also testified defendant arrived that day in "a red car" and parked it in front of the home. The girl also described a woman who was with defendant in the red car when he drove up. The officer "ran the VIN number" for the vehicle and determined it was registered to Joan Stackhouse (Stackhouse) and had been reported stolen. Another officer searched the vehicle and found

Shaffer's purse inside. Police searched the area in and around the residence for a key to the vehicle but were unable to locate one.

Defendant was charged with taking or driving a vehicle without the owner's consent with a prior vehicle theft conviction. (Pen. Code, § 666.5; Veh. Code § 10851.) It was further alleged defendant served five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), and had one prior strike conviction pursuant to Penal Code sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1).

The jury convicted defendant of taking the vehicle without the owner's consent. Following the jury's verdict, defendant admitted the truth of five prior convictions from August 22, 2005, December 20, 1996, April 17, 1992, July 2, 1991, and September 21, 1990. However, he disputed the use of his prior conviction from August 22, 2005, to justify an enhancement under Penal Code section 667.5, subdivision (b), because "the date of the conviction for that particular offense is subsequent to the date of the offense for which [defendant] is convicted [in this case]." It was later determined defendant had only served four prior, separate prison terms within the meaning of Penal Code section 667.5, subdivision (b), because the term he served for his fourth prior conviction (July 2, 1991) was served concurrently with his fifth prior conviction (September 21, 1990). As a result, the fourth alleged prison prior was stricken at the People's request.

The trial court sentenced defendant to a total of 12 years in state prison. To reach the total term, the trial court imposed the aggravated term of four years, doubled to eight years as a result of the prior strike, and added four one-year terms for each of the four prison priors.

DISCUSSION

Sufficiency of the Evidence

Defendant contends there is insufficient evidence to show he took or drove the vehicle in question because Shaffer's testimony was inherently incredible. To support this contention, defendant points to Shaffer's admitted use of heroin, as well as her inconsistent statements to investigators and the court. Defendant also argues there was insufficient evidence to connect the vehicle in question with the one stolen from Stackhouse. We disagree.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The following elements must be shown to prove a violation of Vehicle Code section 10851, subdivision (a): "1. A person took or drove a vehicle belonging to another person; [¶] 2. The other person had not consented to the taking or driving of [her] vehicle; and [¶]

3. When the person took or drove the vehicle, [he] had the specific intent to deprive the owner either permanently or temporarily of [her] title to or possession of the vehicle.”

(*People v. Moon* (2005) 37 Cal.4th 1, 25, fn. 2, quoting CALJIC No. 14.36.)

Contrary to defendant’s contention, the record contains ample evidence connecting the vehicle found in the location where defendant was arrested with the one stolen from Stackhouse. First, the responding officer who testified at trial “ran the VIN number” for the vehicle and determined it was registered to Stackhouse and had been reported stolen. Second, Stackhouse testified the vehicle was taken from her driveway without her consent on July 14, 2005. Her description of the vehicle was consistent with the one observed by the responding officer where defendant was arrested, except the license plates were not on the vehicle at the time. Stackhouse said she did not know defendant and had not given him permission to drive her car. In addition, Stackhouse’s son testified the license plates for the car were in the trunk when it was recovered and returned to Stackhouse from the tow yard. Stackhouse and her son both testified it was possible a valet key may have been left in the glove compartment of the vehicle, which helps to explain how the vehicle was taken and is consistent with Shaffer’s statement that defendant had a key for the vehicle. From this evidence, a jury could reasonably infer that Stackhouse’s stolen vehicle was the one found at the location where defendant was arrested.

We also reject defendant’s contention there is not enough evidence in the record from which a jury could infer that defendant drove the vehicle to the location where he was arrested. First, the child’s testimony was reasonable, solid evidence that defendant did indeed drive the vehicle to the location where it was found by police on the date in question.

Second, the child's testimony was supported by the testimony of the responding officer, who said Shaffer told him defendant drove her to the location in the vehicle. The responding officer also testified Shaffer's purse was found inside the vehicle.

As defendant contends, it is true that Shaffer's credibility was legitimately attacked on several grounds. During cross-examination, Shaffer admitted she was addicted to heroin on the date in question and had ingested it less than one hour before police arrived. Other testimony during cross-examination indicated Shaffer had given inconsistent statements during the investigation and had been pressured by investigators who told her she could be prosecuted for perjury if her statements at trial were different from those she made previously. Her testimony was also impeached with a prior conviction from 2001 for possession of methamphetamine with intent to sell.

On the other hand, Shaffer's statements connecting defendant to the vehicle are believable when viewed in the context of her testimony as a whole, as well as in combination with the child's testimony and other circumstantial evidence. Shaffer testified she is now a "recovering drug addict" and is "trying to do the right thing," but is scared about the repercussions to her family as a result of her testimony. She had a number of telephone conversations with defendant's wife that caused her to feel intimidated or threatened, and she had to change her telephone number.

At first, Shaffer testified defendant did not drive her to the residence in the red car. She claimed she went to the residence with defendant and another man in a black car to purchase a muffler, and the red car was already at the residence when they arrived. However, when confronted with prior inconsistent statements she had given, Shaffer

admitted she had previously said defendant drove her to the residence in the red car. She further admitted her purse was in the red car. The prosecutor then asked defendant about the “support program” she was involved in and whether she had been told her “chances of getting clean are very slim without being honest?” Defendant said, “Yes.” The prosecutor then asked, “How did you get to the house that day?” Shaffer testified she went to the house with defendant in the red car. She also admitted once again that her purse was in the red car.

Under these circumstances, a jury could reasonably conclude Shaffer’s inconsistent statements to investigators and on the witness stand at trial could be explained by her fear of repercussions that could result from her damaging testimony against defendant. A jury could also reasonably believe Shaffer’s statements to the responding officer on the date in question were accurate and believable even though she was admittedly under the influence of heroin. These statements were made close in time to the actual events without time for reflection, and her purse was found in the vehicle. In addition, her statements indicating defendant drove the vehicle were believable because there was corroborating testimony on this point by the child. We must therefore reject defendant’s claim there is insufficient evidence to support the conviction.

Jury Instruction on Previous Consent

Defendant believes an instruction given to the jury on the issue of consent included a mandatory presumption that relieved the People of their burden of proof in violation of his constitutional right to due process. Defendant claims the challenged instruction advised the

jury it could presume a lack of consent and could not use evidence of previous consent by the owner to overcome the presumption. Defendant misreads the instruction.

“[T]he language of Vehicle Code section 10851 places the burden on the People to show by direct or circumstantial evidence that the defendant lacked the consent of the owner.” (*People v. Rodgers* (1970) 4 Cal.App.3d 531, 534.) The jury in this case was properly instructed that the People had the burden of proving “beyond a reasonable doubt” that the defendant “took or drove someone else’s vehicle without the owner’s consent” and with the intent to deprive the owner of possession or ownership of the vehicle for any period of time.

The challenged instruction reads as follows: “Even if you conclude that the owner had allowed the defendant or someone else to take or drive the vehicle before, you may not conclude that the owner consented to the driving or taking on July 28th, 2005, based on that previous consent alone.” CALCRIM No. 1820 is the source for this instruction, and it mirrors the language of Vehicle Code section 10851, subdivision (c).¹ According to the use notes for CALCRIM No. 1820, this instruction is read to the jury “on request” if there is evidence suggesting the owner previously agreed to let the defendant or someone else drive the vehicle in question.

“A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [¶] . . . [¶] Such presumptions violate the Due

¹ Vehicle Code section 10851, subdivision (c), reads as follows: “In any prosecution for a violation of subdivision (a) or (b), the consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of the owner’s consent on a previous occasion to the taking or driving of the vehicle by the same or a different person.”

Process Clause if they relieve the State of the burden of persuasion on an element of an offense.” (*Francis v. Franklin* (1985) 471 U.S. 307, 314, fn. omitted.) To determine whether a presumption is mandatory, courts should consider “whether the specific instruction, both alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts.” (*Carella v. California* (1989) 491 U.S. 263, 265.) For example, the defendant in *Carella* was convicted of grand theft when he failed to return a rented car. (*Id.* at pp. 263-264.) The jury was instructed they could presume the vehicle was stolen or embezzled if the person who leased or rented it did not return it within a certain time period. (*Id.* at p. 264.) The Supreme Court held these instructions relieved the state of its burden of proving all elements of the crime beyond a reasonable doubt and “directly foreclosed independent jury consideration of whether the facts proved established certain elements of the [charged] offenses.” (*Id.* at p. 266.)

As we read it, the challenged instruction merely defines and/or sets forth a rule of substantive law on the defense of consent, not on the element of lack of consent. In other words, the instruction could be relevant where the defendant claims he is innocent because he had the owner’s consent to drive or to take the vehicle. Under these circumstances, the instruction lets the jury know that prior consent on a different occasion cannot be construed, standing alone, to prove the owner also consented to use of the vehicle on the later occasion as alleged in the charging document.

The challenged instruction may have had some relevance in this case because defendant attempted to raise the issue of consent during closing arguments. Defendant’s

counsel argued Stackhouse's testimony about the vehicle being stolen from her driveway "doesn't make sense." Defense counsel also suggested defendant could have borrowed the vehicle from a friend and thought he had consent to drive it.

Contrary to defendant's argument, the instruction is not in any way analogous to the mandatory, conclusive presumptions that have been found to violate constitutional principles. The challenged instruction did not tell the jury it must infer a presumed fact based on proof by the prosecution of any predicate facts. Nor does the instruction relieve the People's burden to establish lack of consent beyond a reasonable doubt. Indeed, the People presented solid evidence of a lack of consent. Stackhouse, who was the registered owner of the vehicle, testified it was taken from her driveway without her consent on July 14, 2005. Stackhouse also said she did not know defendant and had not given him permission to drive her car.

Under the circumstances, it is not likely the jury interpreted the instruction as creating an unconstitutional, mandatory or conclusive presumption that relieved the People of their burden to show lack of consent. We therefore cannot conclude the challenged instruction violated defendant's constitutional right to due process.

Prior Prison Term Enhancement

Defendant challenges the one-year prior prison term enhancement imposed pursuant to Penal Code section 667.5 based on his August 22, 2005 conviction. He contends the term imposed as a result of this particular conviction should be reversed, because he had not yet sustained the conviction or served a completed prison term when he committed the offense

in this case on July 28, 2005. Respondent concedes the term imposed as a result of this conviction should be reversed. We agree.

“Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt.” (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) Penal Code section 667.5 expressly provides for an “[e]nhancement of prison terms for new offenses because of prior prison terms” Therefore, “the prior prison term must be for an offense which occurred prior to the new offense for which sentence is presently being imposed.” (*People v. Shivers* (1986) 181 Cal.App.3d 847, 850.)

Here, the record indicates defendant committed the offense in this case on July 27, 2005, but was not convicted until the jury found him guilty on April 23, 2008. The next day, on April 24, 2008, defendant admitted the allegation he was previously convicted of evading a peace officer (Veh. Code, § 2800.2) on August 22, 2005, in a separate case. The probation report indicates defendant served a three-year prison term for this offense, was paroled on April 1, 2007, and discharged on May 1, 2008. Thus, it appears defendant completed a prior prison term on the August 22, 2005, conviction before he was found guilty in this case on April 23, 2008. However, it is not clear from the record whether the offense which resulted in the August 22, 2005, conviction was committed before or after the offense in this case. As a result, the offense committed in this case on July 27, 2005, may not be a “new offense” in relation to the offense resulting in the conviction on August 22, 2005. Therefore, the record indicates the People did not meet their burden of showing the August 22, 2005 conviction falls within the definition of Penal Code section 667.5,

subdivision (b), so the one-year term added to defendant's sentence as a result of this prior conviction must be reversed.

DISPOSITION

The one-year enhancement under Penal Code section 667.5, subdivision (b), which was imposed based on defendant's prior conviction on August 22, 2005, is reversed and the matter is remanded to the superior court for further proceedings relative to this prior conviction. (*People v. Barragan* (2004) 32 Cal.4th 236.) The judgment is affirmed in all other respects.

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RAMIREZ
P. J.

We concur:

GAUT
J.

MILLER
J.